# STATE OF MICHIGAN

# COURT OF APPEALS

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| AMY P. BEAUCHAMP and SAMUEL BEAUCHAMP,<br><br>Plaintiffs-Appellants,<br><br>v<br><br>JESSE C. SCHRAMM, LAURA SCHRAMM, and 301 GARFIELD STREET, INC.,<br><br>Defendants-Appellees. | UNPUBLISHED<br>September 23, 2014<br><br>No. 313377<br>Marquette Circuit Court<br>LC No. 10-048212-CK |

Before: RIORDAN, P.J., and MARKEY and K. F. KELLY, JJ.

PER CURIAM.

Plaintiffs appeal by right the trial court's order granting judgment in favor of plaintiffs against defendant 301 Garfield Street, Incorporated (Garfield). Plaintiffs argue that the trial court erred in granting summary disposition in favor of defendants Jesse and Laura Schramm (hereafter defendants). We agree and reverse.

In a land contract dated March 1, 2007, defendants agreed to purchase from plaintiffs vacant land (subject property) located in Marquette, Michigan. The land contract provided that, generally, "Buyer shall not assign, sell, or convey all or any portion of Buyer's interest in the Premises or in this Agreement without Seller's prior written consent." But the land contract also contained an exception to the consent requirement permitting the buyer to assign its interest to:

> a. a partnership, corporation, or other business entity in which Buyer, at the time of transfer and at all times after, has a controlling interest, or a trust of which Buyer is the trustee;
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> b. a partnership, corporation, or other business entity in which a close relative of Buyer, at the time of transfer and at all times later, has a controlling interest.

On July 1, 2010, plaintiffs sent defendants notice that the land contract was in default, which resulted in accelerating the entire balance due and foreclosing on the land contract. On July 29, 2010, plaintiffs filed this action against defendants alleging a count of breach of contract seeking the contract price, interest and other damages, and a count to foreclose the land contract.

On October 1, 2010, Jesse Schramm filed articles of incorporation as Garfield's sole director and shareholder. On the same day, by quit claim deed, defendants conveyed their interest in the land contract to Garfield. On October 7, 2010, defendants answered plaintiffs' complaint and asserted as an affirmative defense that they were no longer a proper party, having conveyed their interest in the subject property to Garfield. On October 18, 2010, plaintiffs amended their complaint, adding Garfield as a defendant. On January 24, 2011, plaintiffs moved for summary disposition pursuant to MCR 2.116(C)(9) (failure to state a valid defense) and MCR 2.116(C)(10) (no genuine issue of material fact). On January 26, 2011, defendant moved for summary disposition pursuant to MCR 2.11(C)(7) (claim barred) and MCR 2.116(C)(10).

On March 8, 2011, the trial court granted summary disposition in favor of plaintiffs as to Garfield. But on March 11, 2011, the trial court granted summary disposition in favor of defendants, noting that plaintiffs' claims against defendants for personal liability and any deficiency judgment after foreclosure sale were dismissed.

The trial court did not specify under which court rule it granted summary disposition in favor of defendants. We treat the motion as having been granted pursuant to MCR 2.116(C)(10). See *Kefgen v Davidson*, 241 Mich App 611, 616; 617 NW2d 351 (2000).

We review de novo a trial court's decision on a motion for summary disposition under MCR 2.116(C)(10), considering the pleadings, admissions, and other evidence submitted by the parties in the light most favorable to the nonmoving party. *Latham v Barton Malow Co*, 480 Mich 105, 111; 746 NW2d 868 (2008). We must review the record to determine whether any genuine issue of material fact existed and whether the successful party was entitled to judgment as a matter of law. *Morales v Auto-Owners Ins*, 458 Mich 288, 294; 582 NW2d 776 (1998). "A genuine issue of material fact exists when the record, giving the benefit of any reasonable doubt to the opposing party, leaves open an issue on which reasonable minds could differ." *Ernsting v Ave Maria College*, 274 Mich App 506, 510; 736 NW2d 574 (2007). Moreover, the construction and interpretation of an unambiguous contract, as well as whether contract terms are ambiguous, present questions of law subject to review de novo. *Rossow v Brentwood Farms Dev, Inc*, 251 Mich App 652, 658; 651 NW2d 458 (2002).

As a preliminary matter, we conclude that defendants' argument that plaintiffs' breach of contract claim is moot has no merit. Defendants argue that because plaintiffs elected to proceed with foreclosure, they cannot maintain a breach of contract. The land contract provided a purchase price of $200,000, exclusive of interest. At the foreclosure sale, plaintiffs purchased the property for $151,600, rendering defendants potentially liable for a deficiency balance plus costs and interest. Actions at law are permitted for deficiencies arising from statutory foreclosure absent contractual language to the contrary. See, e.g., *Wells Fargo Bank, NA v Cherryland Mall Ltd Partnership*, 295 Mich App 99, 108-110; 812 NW2d 799 (2011), remanded on other grounds 493 Mich 859 (2012), and *New York Life Ins Co v Erb*, 276 Mich 610, 613; 268 NW 754 (1936). In this case, the land contract expressly reserved plaintiffs' right to pursue both foreclosure and money damages, so plaintiffs' breach of contract claim is not moot.

The parties agree that because defendants defaulted on the land contract, plaintiffs were entitled to both foreclose on the property and seek damages. The question on appeal is whether the defendants are personally liable.

In granting summary disposition in favor of defendants, the trial court relied on *Klager v Robert Meyer Co*, 415 Mich 402; 329 NW2d 721 (1982), rejecting plaintiffs' reliance on *Cinderella Theatre v United Detroit Theatres Corp*, 367 Mich 424; 116 NW2d 825 (1962). We conclude that the facts of this case are closer to those in *Cinderella Theatre* and this conclusion is reinforced by the Uniform Fraudulent Transfers Act (UFTA), MCL 566.31 *et seq*.[1]

As in *Cinderella Theatre*, defendants employed the contract's assignment clause to assign their interest without plaintiffs' consent to Garfield, an insolvent corporation. The *Cinderella Theatre* case involved the long term lease of a movie theater. When the theater's losses became particularly heavy for a two-year period, the defendant assigned its interest in the theater to a dormant wholly owned subsidiary corporation. *Cinderella Theatre*, 367 Mich at 426. The trial court determined that the undercapitalized subsidiary was formed for the sole purpose of receiving the assignment and that defendant made the assignment with no good faith intention to operate the theater. *Id*. at 428-429. Although the lease appeared to permit the assignment, the trial court set the assignment aside as not within the parties' original intention. *Id*. at 429. Our Supreme Court affirmed, noting that the case was one of "incorporating for the purpose of avoiding a present and existing liability[.]" *Id*. at 434, 444. The Court later elucidated its holding in *Cinderella Theatre* "that a proper construction of the assignment clause required the implication of a covenant restricting lease assignment to only solvent assignees." *Klager*, 415 Mich at 414.

In *Klager*, the defendants specifically obtained the plaintiffs' written consent, as required under the lease agreement, prior to assignment. Indeed, the defendants had the option of rescinding the lease, but the plaintiffs consented to the assignment to the undercapitalized corporation apparently knowing its purpose was to insulate the defendants from personal liability. *Klager*, 415 Mich at 405-406, 418. Thus, "[t]he plaintiffs were not victimized by an abuse of the corporate form" but instead "[t]he defendants merely exercised their bargaining power." *Id*. at 413. Thus, the Court upheld the assignment because it "was not a fraud or an attempt to evade the law, but only a means for perpetuating the original understanding of the parties." *Id*. at 414. Further, the plaintiffs did not prove "fraud or other violation of law," nor was a preexisting obligation assigned to the corporation. *Id*. at 412.

In the present case, the land contract expressly allowed defendants to assign their interest, with or without plaintiffs' consent, to a corporation in which defendants had a controlling interest, or in which a "close relative" of defendants had a controlling interest. Also, the terms of

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[1] While plaintiffs failed to specifically plead or argue the UFTA below, it patently applies to the dispute that was argued below. That parties fail to cite law pertinent to their cases does not preclude this court from either recognizing its existence or applying it. See *Wilkie v Auto-Owners Ins Co*, 469 Mich 41, 51; 664 NW2d 776 (2003) ("[C]ourts are to enforce the agreement as written absent some highly unusual circumstance, such as a contract in violation of law or public policy.") and *Rory v Continental Ins Co*, 473 Mich 457, 461, 491; 703 NW2d 23 (2005). See also *People v Rao*, 491 Mich 271, 289 n 4; 815 NW2d 105 (2012), quoting *Mack v Detroit*, 467 Mich 186, 207; 649 NW2d 47, 59 (2002): " '[A]ddressing a controlling legal issue despite the failure of the parties to properly frame the issue is a well understood judicial principle.' "

the land contract do not specifically provide that an assignee corporation be solvent or properly capitalized. Nevertheless, the original agreement of the parties was that defendants would be personally liable on the contract. Unlike *Klager*, but like *Cinderella Theatre*, the assignment at issue was made after the contract was in default, i.e., defendants attempted to transfer liability on a preexisting debt for which this lawsuit was initiated. Garfield was formed, and the assignment was made for the sole purpose of protecting defendants from personal liability on the debt. Also, unlike *Klager*, the assignment in this case was presumptively fraudulent and in violation of the law.

The UFTA provides, in relevant part, that "[a] transfer made or obligation incurred by a debtor is fraudulent as to a creditor, . . . if the debtor made the transfer . . . [w]ith actual intent to hinder, delay, or defraud any creditor . . . ." MCL 566.34(1)(a). In determining whether "actual intent" exists under this subsection, consideration may be given to several factors, including whether "the debtor had been sued or threatened with suit" "[b]efore the transfer was made or obligation was incurred[.]" MCL 566.34(2)(d); see also, *Regan v Carrigan*, 194 Mich App 35; 486 NW2d 57 (1992). Here, defendants incorporated Garfield and transferred their interest in the land contract *after* plaintiffs filed suit. These facts support a conclusion that defendants transferred their interest in the land contract to Garfield with the actual intent to defraud in violation of the UFTA. One of the remedies available under the UFTA is the "[a]voidance of the transfer or obligation to the extent necessary to satisfy the creditor's claim." MCL 566.37(1)(a).

Thus, consistent with the original intent of the parties that defendants were to be personally liable on the contract, we construe the land contract as permitting defendants to assign, without plaintiffs' consent, defendants' "interest in the Premises and the Personal Property" under the contract. But defendants may not assign their personal liability under the contract without plaintiffs' consent, especially where such assignment would be a fraudulent transfer as to plaintiffs.

We reverse and remand for further proceedings. We do not retain jurisdiction. As the prevailing party, plaintiffs may tax costs pursuant to MCR 7.219.

/s/ Jane E. Markey
/s/ Kirsten Frank Kelly